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William G. Carver dba Carver Sheet Metal Works v. W. T. Denn dba Hubbard-Denn Jewelers : Brief of Respondent

Utah Supreme Court

Dan B. Shields; Attorney for Respondent;

7374

Case No. 7374

In the Supreme Court of the State of Utah

WILLIAM G. CARVER, doing business as CARVER SHEET METAL WORKS,

Plaintiff and Appellant,

vs.

W. T. DENN, doing business as HUBBARD DENN JEWELERS,

Defendant and Respondent.

RESPONDENT'S BRIEF

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INDEX

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STATEMENT OF FACTS

This statement of facts will be much the same as that set forth by appellant in his brief. However, there are certain variations so a re-statement of the facts will probably meet the conditions herein presented.

Sometime prior to June 7, 1947, one Fred Dunn, an employee of the respondent, suggested to George Maycock that Mr. W. T. Denn, of the firm of Hubbard-Denn, was interested in a cooling system. It appeared that Dunn had known that Maycock was in the business of installing coolers of one kind and another and asked Maycock if he would consult Mr. Denn about it.

Thereafter Maycock came into Denn's place of business and the two of them did discuss the need of a cooling system for the Hubbard-Denn Jewelers at 221 Main Street in Salt Lake City, on at least two or three occasions. Denn was entirely without any information or learning about the cooling business, nor did he know anything about how air conditioners worked and so informed Mr. Maycock. Maycock had represented himself as an engineer with particular reference to the air conditioning business.

The proposed cooling system was discussed at least on one other occasion, but at no time was any mention made of any type of cooler, Denn placing himself and his needs entirely in the hands of Maycock. It was finally determined that an air conditioner should be installed but at no time during the conversations with Mr. Maycock was there any mention made of any type of air conditioner nor does any of the evidence even suggest such a thing.

It was finally determined that the store should be air conditioned and thereafter Mr. George Maycock brought one Jack Goaslind into the Hubbard-Denn store and told Mr. Denn that the Carver Sheet Metal Works would do the installing of the equipment. Goaslind made certain measurements about the place and proceeded to install what now appears to have been a Palmer Evaporative Air Conditioner. Denn didn't know Goaslind and apparently had never seen him before Maycock brought him in. Denn believed that Goaslind was doing the installing for Maycock until a certain letter dated June 7, 1947, was delivered to him wherein William G.

Carver, doing business as the Carver Sheet Metal Works, agreed to furnish and install a 7500-H Palmer Evaporative Air Conditioner with all necessary fittings and grill for the sum of $870.00, which included electrical and necessary plumbing work.

The fact that it was a Palmer or any other type of machine meant nothing to Mr. Denn because he had absolutely no information about such machines and he had placed his entire reliance upon Maycock.

The machine was supposed to make no more noise than an electric fan, but after it was installed, the noise was so great that they were obliged to turn it off. Later Goaslind came back and insisted that they could make the machine operate satisfactorily, but after several attempts the machine does not operate satisfactorily, it does not cool the store; it is noisy, carries dust into the store, which hampers the watchmakers in their work, and in all respects is an unsatisfactory operation.

It develops that after Maycock had succeeded in selling Denn a cooling system, the name of which was never mentioned, he then supplied the equipment to the appellant herein, and from that time on it was the appellant who did all the work and now seeks to be paid for the equipment and its installation. Maycock disappeared from the transaction and admits under oath, as appellant's witness, that there is no obligation financially or otherwise to him from respondent in this action.

It appears from the record affirmatively and without dispute that neither Denn nor Dunn, his employee, had ever heard of the Palmer Evaporative Air Condi-

tioner, and that the name thereof meant absolutely nothing to them, and it likewise appears from the testimony of George Maycock that the only thing that ever was talked about was just the function of the machine.

With respect to the cooling service which the machine rendered, Mr. Dunn testifies that he placed a thermometer which was so used all summer in the front of the store and they got 98°, and the thermometer showed that at the same time it was 94° in the office; that in the front portion of the store, the cooler made no material difference in the heat; that when the machine was working it made a tremendous humming noise so that customers and clerks alike were obliged to raise their voices in order to be heard; that the machine disturbed customers when it was running and in order to do business in the store, the machine had to be shut off; that in the place where the watchmakers worked, when the machine was running, a film of dust was drawn in from the outside and laid on the watchmakers' benches so that good watchmaking could not be done; and that in addition to that when the machine was working, the watchmaking room was so hot that it was very uncomfortable for the people working there. This evidence is entirely undisputed.

Another objectionable feature was the odor, which was described by the witness Dunn as like old wet gunny sacks, was noticeable always when the machine operated. However, in spite of all this both Mr. Dunn and Mr. Denn stated that if a machine could be made to work, they wanted a cooler in the store but they wanted one

that would give them more cooling in the store than 98° front and 94° in the back end.

ARGUMENT

Appellant has stated that the only question to be determined in this appeal is the proper application of Section 81-1-15 Utah Code Annotated 1943, and particularly subdivisions (1) and (4) of this Section, to the facts, which subdivisions read as follows:

> (1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

and he asks the question, "Can an installer who is neither the dealer nor the manufacturer of an article which is described by its patent or trade name be charged with an implied warranty of quality, particularly where there is a complete absence of any evidence of reliance by the buyer upon the installer?"

Respondent might have some little agreement with the first part of the above declaration, but believes that the evidence which has been introduced in this case thoroughly justifies the implied warranty of quality which the trial court found was there.

Referring to one of plaintiff's witnesses, George Maycock, appellant states that this witness testified that he was asked by Fred Dunn to come to defendant's place of business to discuss the installation of a cooling device; that he did so and after several meetings with the defendant, W. T. Denn, and with Fred Dunn, they decided upon the installation of a Palmer Evaporative Air Conditioner. Counsel has drawn largely on his imagination for this idea because the record will be searched in vain for any such evidence. Nowhere in the testimony of Mr. Maycock nor in the testimony of any other witness is there any statement that Dunn or anybody else ever decided upon the installation of a Palmer Air Conditioner. As a matter of fact, the first time that respondent or anybody in their employ appear to have ever had the slightest information that a Palmer Evaporative Air Conditioner was the type to be installed is found in the letter, defendant's Exhibit 1, which was delivered to Mr. Denn by Carver himself after Goaslind had been taken to Denn's place of business by Maycock (Tr. 103), and it is singularly significant that in no place in the testimony introduced is there any recommendation about the quality of the Palmer Air Conditioner, and if we may draw a conclusion from the testimony of Mr. Maycock as found on page 38 of the reporter's transcript, or page 68 of the record, it will be noticed that Maycock seemed not now to represent the Palmer company, which would indicate that even the Maycock people are not sold upon that type of cooler.

An analysis of the circumstances which lead up to this litigation may be helpful here. The respondent was

desirous of installing a cooler of some type and it must be admitted that the evidence preponderantly bears out the fact that Mr. Denn nor none of his associates knew anything about cooling systems. An expert in the line and one who had had dealings with this type of service was contacted. He made several visits to respondent at his place of business and finally it was decided that a cooler would be installed. There is absolutely no evidence, as we have indicated above, as to the type of cooler at that time, nor is there a single word of testimony which would indicate that the name Palmer Evaporative Air Conditioner was ever used.

It appears that the negotiations covered between two and four weeks (Tr. 70). Maycock indicated to Denn that a fair degree of cooling could be secured from the cooling system and that there would not be a great deal of noise in its operation (Tr. 72). It was decided as undesirable to place the mechanism outside the building in the alley. There is a dispute in the testimony as to whether the installation was to be made by a contractor or if Denn would do the installing himself, or that the Carver Sheet Metal Works should make the installation. Maycock took Jack Goaslind of the Carver Sheet Metal Works to talk with Denn with relation to the installation and he, Maycock, declares that beyond that he knows nothing about the installation itself. He does admit, however, that he showed Goaslind where the installation was to be and he had seen the installation after it was complete. He admits that there was too much noise and there was an accumulation of condensation on the ceiling which caused water to drop;

that a new motor was installed and that other changes were made in the installation, and finally a peripheral lining was placed around the cabinet work.

Maycock had been in the evaporative air conditioner installation business for twelve years. He testified that as to dust or dirt on the affluent, the outside air side, it should be practically eliminated; but on the inside you can't do a thing about it. There is nothing that can be provided to eliminate the amount of dust or odor or anything of that sort which might be in the air as it comes into the conditioning unit.

Maycock was the engineer who was in charge of this installation and admitted that there was noise when the machine was running. Maycock admitted that the store was very warm and that he had seen the thermometer and as he remembered it was 84°. He admitted that it might have been higher; testified that it didn't make any difference to Denn what the machine was, whether it was a Smith or Palmer, or any other machine; that he didn't elaborate on the quality of the machine, just its function. It was Maycock who wrote the letter for the Carver people, defendant's Exhibit 1 (Tr. 109).

Denn testified that he didn't know Goaslind until Maycock brought him in and was of the opinion that Goaslind was doing the installing for Maycock. In fact, he knew no different until the letter of June 7, 1947 was delivered to him. Denn, of course, knew absolutely nothing about where such a machine should be installed, nor how, nor any of the details, and had to rely, as indeed he did, entirely upon the people furnishing and installing

the machine. There was a bit of smooth maneuvering on the part of Mr. Maycock. He attempts to avoid responsibility and, so far as Mr. Denn is concerned, succeeded because he sold the equipment to the Carver people who agreed to furnish and install it, Exhibit 1, and Maycock declares that respondent owes him nothing. Why, we wonder, did Maycock dodge this issue?

The plaintiff knew that they were installing a cooling system in a jewelry store. He knew it was required to cool the store. He knew too that the machine should not disturb customers. He knew that if it threw water all over the ceiling and made it appear to be raining in the building, that the machine wasn't working properly. He knew that in a jewelry store watches are repaired; that dirt on a watchmaker's bench would be just about as appropriate as kerosene on a baker's molding board. He knew too that neither Denn nor anybody in the jewelry store knew anything about cooling systems. At least this latter is a reasonable presumption from the testimony which has been introduced.

Now, what did the machine do? Beginning at the end of the room in which it was installed, we find that it threw dust in on the work benches of the watchmakers to such an extent that it had to be shut off. Also, that very room which up to the time the cooler was installed was reasonably comfortable in the summer time, when the machine was running the room was unbearably hot (Tr. 65). The machine when first installed threw off so much water that the water actually dripped from the ceiling. That, however, was corrected to a certain extent. The noise of the machine when it was operating after

the last corrections were made is so great that people working in the store in dealing with customers have to raise their voices to a place where it is uncomfortable for everybody. The machine is distracting to customers and makes the doing of business hard, to say the least. The machine does not cool the store, particularly the front or west end where the customers come in. A thermometer was installed and was kept there throughout the entire summer. In the afternoons the temperature in the store went up to 98° in the front and back in the office it was cooled down to 94°, all of which can be seen as unbearably hot. A cooling machine that did not cool the front of the store below 98° would be absolutely useless to the respondent.

Appellant made various efforts to adjust the difficulties but there never was a time when the machine would work so that the customers were not disturbed; when dust was not brought into the watchmakers' benches; when the front end of the store was not exceedingly hot; when the watchmakers' room was not so hot that the men could hardly work in it, and all in all the machine was an absolute failure and after repeated efforts on the part of the people who installed it, no change was brought about in the conditions, and thereupon a recision of the contract was declared and Carver notified to take out the machine. It seems that no other conclusion can be reached than that this machine failed to do and perform the offices for which it was purchased.

The section of the statute above set forth provides that there is no implied warranty of quality or fitness for any particular purpose under a contract to sell except

where the buyer absolutely or by implication makes known to the seller the particular purpose for which the goods were required and the buyer looks to the seller's skill to supply that need. Certainly in this case the buyer indicated clearly what his need was and it is admitted that the buyer knew nothing about that type of equipment. Granting that appellant was not in on all the preliminary conversations, the fact remains that he was in the business of furnishing and installing such equipment. He knew it was a cooler and he knew what a cooler was supposed to do, and while there is no privity of contract at all between Denn and Maycock, there certainly may be such a responsibility between Carver and Maycock that Carver can be relieved of any damage he may sustain as the result of the failure of this equipment in defendant's store, but the respondent has nothing to do nor is he concerned with this.

Appellant has cited the case of Landes and Company v. Fallows, 81 Utah 432, 10 Pacific (2d) 389. This case dealt with the purchase price of a harvester for which the suit was brought. The defendant pleaded a breach of implied warranty but the court found against the defendant upon the theory that the contract provided against such a warranty.

Battle Creek Bread Wrapping Machine Company v. Paramount Baking Company, 88 Utah 67, 39 Pacific (2d) 323, is also cited. In this case the court found:

> "The fact that an article has a trade name does not negative an implied warranty of fitness for a particular purpose where it is purchased not by name but for a particular purpose and supplied for that purpose."

In the case at bar a cooling system was ordered for a particular purpose and it was installed and it did not deliver the service for which it was sold, and the courts have held that the buyer of a machine may under the common law or the uniform sales act rely upon an implied warranty of fitness for the purpose indicated where he made known to the manufacturer and the seller the purpose for which the machine was desired, and trusts to the latter's skill and judgment to furnish a machine suitable for the purpose.

Dunn Road Machine Company v. Charlevoix A. & Engineering Company, 247 Michigan 398, 225 Northwestern 592, 64 ALR 947. J. L. Owens Company v. Leland Farmer Elevator Company, 192 Iowa 771, 185 Northwestern 590.

Universal Motor Company v. Snow, 149 Virginia 690, 140 Southeastern 653, 59 ALR 1174.

In this case the motor company through its salesman sold to the defendant a mill to be substituted for a burrmill then in use by the defendant. The mill was installed and the defendant made a cash payment and gave two notes for the balance. The first note was paid but when the defendant refused to pay the second note, an action was brought to enforce its payment and the defendant by answer claimed a breach of warranty attending the sale because he said the mill wouldn't do what it was supposed to do. In this case a small model mill was exhibited to the defendant. In the case at bar no such proof exists. However, the mill would not do what it was represented it would do, and the court found

that there was an implied warranty in favor of the defendant and found against the plaintiff and this finding was affirmed by the court of last resort. In the course of that opinion the court approved the doctrine in Linen Thread Company v. Shaw, 9th Fed. (2d) 17, wherein the court said:

> "Regardless of the statutes of Massachusetts, there is under the common law an implied warranty that articles supplied by a manufacturer or a dealer shall be reasonably fit for the purpose for which he knew they were intended provided the purchaser relies on his skill and knowledge."

In Jones v. Just, 23 English Ruling Cases 466, the rules of implied warranty are classified and approved and under subdivision 4 of such classification is the following:

> "Where a manufacturer or dealer contracts to sell an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that the article will be reasonably fit for the purpose to which it was to be applied."

In Bristol Tramways and Carriage Company v. Fiat Motors, K.B. 831, it is held:

> "Where the buyer of certain omnibuses informed the seller they were required for a certain character of traffic, this statement was held sufficient to show that the buyer relied upon the seller's skill or judgment without any further evidence on the point, and that, being so, there was

an implied condition that the omnibuses would be reasonably fit for the declared purpose."

See also Ireland v. Lewis K. Liggett Company, 243 Massachusetts 243, 137 Northeastern 371.

Counsel cites Iron Fireman Coal Stoker Company v. Brown, 182 Minnesota 399, 234 Northwestern 685 and quotes at length from the opinion. He stops his quoting where the language does him the most good; however, he should have continued because the opinion goes on after citing cases to say:

> "Such cases as Aetna Chemical Company v. Spaulding and Kimball Company, 98 Vermont 51, 126 Atlantic 582; Remsberg v. Hackney Manufacturing Company, 174 California 799, 164 Pacific 792; and Empire Cream Separator Company v. Quinn, 184 Appellant Division 302, 171 New York Supplement 413, seem to be grounded on the thought that the purchaser knew what he was ordering and is inferentially credited with having made the selection:"

The court then goes on to say:

> "This provision of the statute is merely a restatement of the common law rule where it is a sale of the known, described and defined article, and if that article is in fact supplied there is no implied warranty but we think the rule at common law and now under such a statute means articles known in the market and among those familiar with that kind of trade by description." Citing cases, and then:
>
> "In this case it would seem that the Iron Fireman wasn't known to defendants. They were entirely ignorant as to its ability or capacity to

work or the work which it would do. Plaintiff was in possession of all these facts. Defendants did not even know it had a trade name. It then had a limited use in their community * * * They had no knowledge of the Iron Fireman by reputation or otherwise. They made their desires known to plaintiff * * * Defendants unsuccessfully attempted to make it work. Plaintiff knew defendants had no knowledge of the equipment or its operation. Defendants' reliance on plaintiff's judgment as to the suitability of the equipment to meet their requirements is evident from all the circumstances * * * The fact that the article had a trade name does not do away with the implied warranty arising out of the circumstances indicated." Citing cases.

In this case it is also found that where a buyer ignorant of his own requirements informs the seller of his particular needs and the seller undertakes to select and supply an article suitable for the purpose involved, subdivision (1) and not subdivision (4), G. S. 1923 (Section 8390) applies even though the article may be described in the contract of sale by its trade name.

In Bagley v. International Harvester Company, 206 Pacific Reporter (2d) 43, the court says:

> "The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs and the question as to whether the article was described by its trade name or trademark is not conclusive if the other conditions exist which would raise an implied warranty of its character."

Pierce v. Crowl, 190 Pacific (2d) 1003. This was an action brought by plaintiff against the defendants for recovery of damage because defendants used a defective material which caused the house of plaintiff to give off moisture both on the inside and outside and plaintiff was damaged by the sweating of his house. There was a defense interposed but the court held:

> "Where an article of personal property is sold for a definite purpose made known to the seller and the seller represents that the article will perform that particular purpose, there is a warranty of fitness which protects the purchaser and for which the seller is liable in the event the article fails to do what it was sold to do." Citing cases.

In Greenland Development Company v. Allied Heating Products Company, 184 Virginia 588, 35 Southeastern (2d) 801, 164 ALR 1312, the court reiterates the doctrine that when one contracts to supply an article in which he deals to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the vendor, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied, and the better doctrine is that the rule applies to dealers as well as manufacturers, and this court also declares that where the purchaser does not designate any specific article but orders a particular quality for a particular purpose and the seller knows of this purpose, the presumption is that the purchaser relies upon the judgment of the seller and the seller by undertaking to furnish the goods impliedly undertakes that they shall be reasonably fit for the purpose for which they are intended.

Appellant makes much, or attempts to make much, of the fact that this cooling system was described by its patent or trade name and cites several cases in support of the fact that there can be no implied warranty that an article would suit the particular needs of the buyer where it is selected by its trade name or trademark even though the buyer had communicated to the seller his particular use for or the need for the article, or the seller had otherwise obtained information in this regard. It is submitted that so far as the case at bar is concerned, these cases have no application and they are clearly distinguishable because in the case at bar the respondent had absolutely nothing to do with the selection of the article and the fact that it had a name meant simply nothing to respondent. He didn't see the article before it was installed; he knew nothing about the distinction or the good and bad qualities of competing equipment. As a matter of fact, he had never heard of the Palmer Evaporative Air Conditioner before he saw the name written in the offer of appellant to install it, and he was absolutely without any knowledge as to what it would do or how it would do it, and he relied entirely upon the people selling him the equipment and installing it that it would produce the desired effect.

Not only that, but there is no evidence of any kind that the name of the cooler installed is a trade name or that there are patents affecting it. Nor is there the slightest indication of any kind which would even impute knowledge about the machine or its possible workings to respondent. Appellant knew all about it and the undis-

puted evidence here indicates preponderantly that respondent relied on appellant fully.

The fact that appellant determined to take over where Maycock left off is not the responsibility of the respondent, and the fact that appellant was willing to take a chance on the equipment which he did install is likewise not any responsibility of the Hubbard-Denn Jewelers. But appellant took on the responsibility of installing a cooler in the store of Hubbard-Denn Jewelers which would cool the place and which would not be noisy nor dusty nor discommode customers and for a certain price. The machine failed to do all the things for which it was wanted and for which respondent relied upon appellant.

It is, therefore, insisted that there was an implied warranty of fitness that it would do all the things which respondent required to be done, and having failed to do so, as is shown by a preponderance of the evidence in this case, the judgment of the trial court was right and should be affirmed.

Respectfully submitted,

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